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No. 89-1829

Supreme Court, U.S.
FILED
JUL 3 1990
JOSEPH F. SPANIOLO
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

FMC CORPORATION,
Petitioner,

vs.

TODD GANDER,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

Respondent, in his opposing brief, tacitly concedes the arguments raised by FMC in its Petition for Writ of Certiorari, as respondent fails completely to respond to those arguments. Instead, respondent relies on a recounting of the severity of respondent's injury, which has never been at issue, and on arguments rehashed from his appellee's brief for the Eighth Circuit concerning preservation of error and waiver; the majority, in its opinion, either rejected those arguments explicitly or ignored them altogether. The importance and substantiality of the questions presented have not been refuted.

I.

There is a clear conflict between the circuits regarding the effect of federal income taxes on a lost income projection and regarding non-taxability of a final award. This Court should grant certiorari to resolve this conflict.

The Eighth Circuit majority's decision approved the trial judge's exclusion of evidence, argument and instruction regarding the effect of income taxes on respondent's projection of lost future income and regarding the non-taxability of a final award. The court's decision is thus in conflict with the decision of the Seventh Circuit Court of Appeals in *In re: Air Crash Disaster Near Chicago, Illinois*, 701 F.2d 1189 (7th Cir. 1983), in which the court held that it was error to refuse such evidence, argument and instruction.

Respondent, in his brief in opposition, makes *no* arguments to refute that this conflict exists, but merely states that the various circuit courts are "relatively uniform" on these issues. FMC suggests that being "relatively uniform" on an issue is akin to being "a little bit pregnant." If, as respondent concedes, there is not full uniformity between the circuits, then a conflict does exist between the circuits. This Court should grant certiorari to resolve that conflict and establish a fully uniform body of law.

A. Effect of taxes on lost income projection.

In regard to the effect of income taxes on respondent's future lost wage projection, respondent simply argues that Missouri law does not permit cross-examination on this issue. Even assuming the accuracy of respondent's position, respondent's argument fails to address the true conflict that exists. The *In re: Air Crash* court applied federal law on this question and held the cross-examination to be proper while the Eighth Circuit majority has applied state law and excluded the cross-examination. Respondent's position that Missouri law precludes such evidence begs the question of whether the Eighth Circuit appropriately applied Missouri law on this issue.

Rather than address the issue pertaining to the conflict among the circuits on this issue, respondent seeks refuge in arguments that FMC

somehow failed to preserve its claims of error in regard to its attempt at cross-examination on the effect of income taxes. The same waiver arguments were addressed *and rejected* by the Eighth Circuit in its opinion.

As the majority recognized, FMC attempted to cross-examine respondent's economics expert as to income tax effects on a lost wages projection. While the district court initially stated it would allow FMC to cross-examine on income taxes, it also said that it would grant a mistrial if respondent were able to show that such cross-examination was improper. FMC later presented further legal support for its position on the propriety of such cross-examination, but the trial court adhered to its original ruling.

Respondent then presented the testimony of a union official in an attempt to lay the foundation for respondent's lost wages projection. FMC attempted to cross-examine as to whether the official's figures were net or gross, but respondent objected on the basis of the previous discussions, and the objection was explicitly sustained. Based upon this record, the Eighth Circuit majority held:

While the district court's initial ruling on Gander's first objection to FMC's cross examination was to conditionally allow it subject to a mistrial, the court expressly sustained this second objection to the same sort of cross-examination. Thus, while Gander argues at oral argument that FMC could not appeal from the district court's ruling in its favor, we think that FMC's claim that it was effectively prohibited from undertaking its proposed cross examination is essentially accurate.

Opinion of Eighth Circuit as included in Appendix A-24 n. 5 of FMC's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit [hereinafter "Opinion"].¹ The majority, therefore,

¹As reprinted in the appendix of both FMC and respondent's original briefs, footnote 5 contains a typographical error omitting a portion of the footnote. The footnote, as it appears in the Eighth Circuit's opinion, is fully set out above. See also 892 F.2d at 1381 n.5.

saw through respondent's attempt to dodge the issues in this case and this Court should do the same.

Respondent also argues that the record was not adequately preserved because, following this rejection of income tax evidence, FMC did not tender a jury instruction explicitly referring to the effect of income taxes on a lost wages projection. In the instant case, however, as in *In re: Air Crash*, the trial court prevented cross-examination on the subject. Moreover, an instruction can only be given when supported by evidence presented at trial. When a trial court has made it clear that it is precluding evidence on an issue, a party does not have a duty to tender jury instructions based upon the proffered evidence that has already been clearly excluded by the court. *Cf. Socony Mobil Oil Co. v. G. C. Taylor*, 388 F.2d 586 (5th Cir. 1967) (appellant had no duty to tender instruction following court's overruling objection to subject of voir dire). By rejecting FMC's cross-examination as to the effect of income taxes on the lost wages projection, the district court effectively precluded FMC from arguing or instructing on this issue.

There is, therefore, a clear conflict between the circuit courts on this issue. In *In re: Air Crash*, the Seventh Circuit applied federal law and permitted evidence as to income tax effects on a lost income stream. In the instant case, the Eighth Circuit applied state law to reject such evidence.

B. Non-taxability of a final award.

Respondent makes a similarly flawed argument in respect to the conflict between the circuits on the propriety of instruction on the taxability of a final award. Again, respondent suggests that FMC has failed to preserve this issue on appeal and goes so far as to accuse FMC of misstating the record. It is, however, respondent's reading of the record that differs with the reading given by the Eighth Circuit Court of Appeals. The majority addressed the issue of the taxability of a final award, while stating that FMC had tendered an instruction on present value "which it then linked to the issue of whether the total award was subject to income taxation." Opinion at A-24. The majority then stated:

With reference to the present value instruction and proposed argument on income taxes . . . FMC makes reference to Gander's income tax liability on the judgment. . . . FMC may have been concerned that the jury would inflate the judgment to compensate for income taxes if it were not informed that the judgment is not subject to income tax.

Opinion at A-24 n. 6. Respondent's reading of the record, therefore, differs with the interpretation by both FMC and the Eighth Circuit.² Again, the Eighth Circuit was not persuaded by respondent's attempt to avoid the substantive issues on appeal and this Court should similarly reject respondent's attempt to circumvent the issues.

Regarding the substantive issue of the propriety of argument and instruction on the non-taxability of the final award, respondent first cites decisions from four other circuits which it claims conform to the Eighth Circuit's view on this issue. This argument does not, however, dismiss the fact that there is a conflict between the Eighth Circuit's view and that of the Seventh Circuit and, in fact, emphasizes the existence of a conflict among the various circuits.

Respondent then argues that "a close reading" of the *In re: Air Crash* decision shows that there is no conflict between the circuits. A close reading of that decision, however, only serves to show that respondent has misrepresented the holdings of the court. The *In re: Air Crash* court did not merely state, as respondent suggests, that the giving of a non-taxability instruction would be harmless, but rather reversed a ruling by the district court which rejected such an instruction. *In re: Air Crash*, 701 F.2d at 1200. Respondent also represents that the Seventh Circuit "recognized that its conclusion would be different if Illinois interpreted its own substantive law to preclude *such an instruction*." Respondent's Brief at 8 (emphasis added) (citing *In re: Air Crash*, 701 F.2d at 1200 n.7). The Seventh Circuit, however, actually stated that its:

² Similarly, at oral argument, respondent's counsel represented that he had asked for \$4,900,000 in damages, but the Eighth Circuit, after reviewing the record, found he had only asked for \$3,000,000. Opinion at A-22 n.4.

conclusion would be different if Illinois interpreted its own substantive law to include a right to *such a possible bonus* [beyond compensatory damages].

701 F.2d at 1200 n. 7 (emphasis added). Respondent's transparent revision of the court's holding, therefore, is misleading. The court did recognize that Illinois courts would reject such an instruction, based upon their interpretation of federal law. The court merely recognized that its conclusion would be different if Illinois had a substantive interest in providing a plaintiff with windfall damages in contravention of federal tax law. Neither Missouri nor Illinois has such an interest.

The decision in *In re: Air Crash Disaster* is in conflict with the Eighth Circuit's decision in the instant case. The Seventh Circuit reversed an order of the district court refusing an instruction on the non-taxability of a final award. The Eighth Circuit has affirmed the refusal of instruction and argument on the non-taxability of a final award. There is a conflict among the circuits on this issue and this Court should grant certiorari to resolve this conflict.

II.

In this case, in which the majority found the verdict form "misleading," "confusing," "unclear," and "ambiguous," and recommended that the verdict form never be used again in the Eighth Circuit but nevertheless upheld its use in this case, this Court's supervisory power should be invoked.

In point V of his opposing brief, respondent spends nearly three pages arguing that the judgment at issue conforms with Missouri law on strict liability and the submission of alternative theories. Those questions have never been at issue in this case, a point recognized by the Eighth Circuit majority when, after briefly dealing with those questions, it states:

This does not, however, end the matter. FMC's argument is better stated in terms of the verdict form's correctness. That is, the fact that the amended judgment properly reflected Missouri

law does not mean that the verdict form itself did not misstate Missouri law or unduly confuse the jury.

Opinion at A-15-16. Plainly, respondent's argument was of little interest to even the majority, and is of no consequence here. FMC does not dispute the substantive law of Missouri; instead, FMC asserts that federal law and the rulings of this Court, as set forth in the Petition, require that jury instructions and verdict forms recite the state's substantive law not only accurately, but also clearly and fairly.

Respondent next relies on the majority's observation that the instructions as a whole correctly instructed the jurors on the law. That premise was called into question, however, by Judge Henley in dissent, whose opinion is instructive on this issue:

If the district court had given an appropriate instruction that the plaintiff's fault would not reduce his recovery under the strict liability claim, I might be less concerned about the verdict form. The majority points out that the trial judge instructed the jury to find the total amount of damages "disregarding any fault on the part of the plaintiff" and that the jury was told the plaintiff's recovery from negligence would be reduced by the percentage of his fault. These directives, however, provided no guidance on whether the plaintiff's fault would affect his recovery under the strict liability claim. The jury could have understood and followed all of its instruction and still have logically interpreted the note on the verdict form to mean that the plaintiff's recovery under strict liability would be reduced by the percentage of his fault. In these circumstances, I do not believe that the "charge as a whole . . . state[d] the governing law fairly."

Opinion at A-30 (dissenting opinion of Henley, J.) (citation omitted).

Next, in his point VI, respondent argues that FMC did not preserve any error relating to the verdict form's closing note. This gambit, again, was tried by respondent at the appellate level without success: the point was entirely ignored by the majority, which, having the trial record before it, was able to see that FMC had objected to the verdict

form at trial, had submitted verdict forms in its pre-trial compliance and supplemental instructions (as opposed to the verdict form at issue, which plaintiff unveiled for the first time at the instruction conference literally minutes before closing argument; Trial Record at vol. 3, p. 209), and had raised the issues pertaining to the verdict form and its closing note in its Motion for Reconsideration and Motion for New Trial following the trial court's reversal of its March 15, 1988 judgment. Respondent would apparently have this Court find that FMC should have both anticipated the trial judge's reversal and put no stock in either the March 15 judgment or the judge's comments on the closing note at trial:

THE COURT: Well, "we, the jury, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be two million dollars."

MR. HULLVERSON: That's right.

THE COURT: And then the note says, "If there's assessed a percentage of fault [to] any defendant on plaintiff's claim for injury based on negligence, the Judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to the plaintiff."

....

THE COURT: *This is directing me to reduce [the verdict] by 90%.*

Trial Record at vol. 3, p. 274 (emphasis added).

Only upon the trial court's reversal did the note become an issue. Respondent's "argument" serves only to fog the issues raised by FMC. The decisions of this Court as well as the circuit courts have long held that jury instructions must be couched in language of such definite and legal interpretation as to not mislead either the court or the jury as to its precise meaning, and that misleading instructions are grounds for reversal. In a case such as this, in which the majority found the verdict form to be "misleading," "confusing," "unclear," and "ambiguous,"

and therefore recommended that the verdict form never be used again in the Eighth Circuit, surely this Court's supervisory power should be invoked to ensure that FMC is treated as the majority would treat future litigants, and to instruct the circuit courts on the importance of their role in scrutinizing jury instructions and forms for correctness and defects.

CONCLUSION

In light of the inability of respondent to face the issues presented in FMC's Petition, the need for plenary review of these matters is indisputable; indeed, FMC suggests that summary reversal is now in order.

Respectfully submitted,

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